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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JORGE VENSES PEREZ, Defendant and Appellant.	B233549 (Los Angeles County Super. Ct. No. BA360068)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig Richman, Judge. Affirmed.

Mark David Greenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Erika D. Jackson, Deputy Attorneys General, for Plaintiff and Respondent.

Jorge Venses Perez appeals from the judgment entered upon his convictions by jury of three counts of continuous sexual abuse of a child under 14 years of age (Pen. Code, § 288.5, subd. (a), counts 2, 5 & 10)[1] four counts of committing a lewd act on a child under 14 years of age (§ 288, subd. (a), counts 3, 4, 6 & 9), one count of forcible oral copulation (§ 288a, subd. (c)(2), count 7) and one count of forcible rape (§ 261, subd. (a)(2), count 8).[2] As to all counts, the jury found to be true the allegation that appellant committed the offense against more than one victim within the meaning of section 667.61, subdivision (c). The trial court sentenced appellant to an aggregate state prison term of 75 years to life. Appellant contends that (1) placing CALCRIM No. 1190, the noncorroboration rule for sexual assault crimes, immediately after CALCRIM No. 301, the single-witness rule, created a substantial likelihood that the jury misinterpreted CALCRIM No. 1190, and (2) there is insufficient evidence to support his conviction in count 7 of forcible oral copulation.

We affirm.

FACTUAL BACKGROUND

Introduction

In 1999, Maria M. (Maria), then 31 or 32 years old, came to live in Los Angeles with her three daughters: E.I., born May 1993, L.M. born October 1994, and A.M., born October 1996. There, Maria met 19-year-old appellant and developed a relationship with him. In 2000 or 2001, Maria moved into a small apartment with appellant and her daughters, a block from her sister, Araceli, with whom Maria and her daughters had been living. Maria and appellant had two children: a daughter, M.P., born July 2001, and a

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1 All further statutory references are to the Penal Code unless otherwise indicated.

2 Count 1, alleging sex/sodomy with a child under 10 (§ 288.7, subd. (a)), was dismissed at the People's request pursuant to section 1385.

son, O.P., born March 2005. Appellant sexually abused each of his stepdaughters, as recounted below.[3]

Crimes against L.M. (counts 4-8)

Appellant began molesting L.M. when she was eight years old in third grade. He would touch her breasts and "private area" underneath her clothes. When she was in sixth grade, he began inserting his penis in her vagina. Each time he did so, he first licked her vagina. He would pull his shorts and underwear down and lie on top of her on the bed in his room. When L.M. felt pain and told him that it hurt, he nonetheless continued. If she tried to get away, he would say, "No, it's okay." Once his penis was inserted, he made L.M. touch it. When appellant was done, he would tell L.M. to clean herself. As she did, she saw "liquid."

These assaults occurred more than 10 times when L.M. was in the sixth grade, more than 10 times when she was in the seventh grade and more than three times in ninth grade. When L.M. told appellant "no" when he tried to touch her, he would get angry, hit her with a belt, and make her clean the house. Consequently, when appellant called her to his room to sexually abuse her, she complied, fearing she would suffer these punishments.

When L.M. was in fifth grade, she first told E.I. what appellant was doing to her. E.I. said that it was also happening to her. When L.M. was older, E.I. said she was going to stay around the house to protect L.M. In the eighth grade, L.M. also told A.M. that appellant was molesting her. A.M. cried and said that the same thing was happening to her. L.M. did not tell her other relatives or teachers because she did not think they would understand. She also feared that if she did so, appellant "would [do] something to [them]," and she and her siblings would be separated from their mother.

When L.M. was 13 years old, in seventh or eighth grade, a social worker visited her home because M.P. had complained about a bruise to a teacher. L.M. knew that

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3 Because appellant challenges the sufficiency of the evidence only as to count 7 related to L.M., we present detailed evidence only with respect to L.M. and a more abbreviated statement of facts with respect to E.I. and A.M.

appellant had hit M.P. with a sandal or belt. Because she was frightened, L.M. did not tell the social worker that appellant had hit M.P. and lied by stating that she felt safe at home. Appellant always warned her to say nothing about what he was doing.

In the summer of 2008, L.M., told her mother that she did not like how appellant treated her and that she did not want to be around him. She reported that he touched her breasts, but said nothing about the other things that he did. Maria was upset but did not know what to do. Appellant's molestations continued after this discussion. After L.M. turned 14 years old, he continued inserting his penis in her vagina and putting his mouth on her vagina.

In December 2008, appellant left the family home with some clothes. Before he left, he told L.M., "You are not going to get rid of me." After a week, he moved back and told L.M. he would give her a month. She did not know what he meant. However, on a night when her mother and E.I. were not home, appellant called L.M. into the bedroom and told her the month was over. He told her to take off her clothes, and she refused. He became angry and threw her against a wall. He did not sexually assault her that night.

On June 12 or 19, 2009, appellant returned from the Laundromat where he had gone with the rest of the family. He returned home, purportedly to retrieve some documents. L.M., who had remained home, stayed in the bathroom, thinking he would promptly leave. When she finally came out, appellant was still there and told her to come to the bedroom. When she got there, he grabbed her and removed her clothes. She ended up on her back in bed. Appellant attempted to insert his penis in her vagina. She did not try to stop him because the last time she refused, he threw her against the wall. L.M. did not clearly recall if appellant placed his mouth on her vagina on this occasion, though she testified that he did the same thing as "usual."[4]

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[4] L.M. testified, however, that appellant did put his mouth on her vagina after her 14th birthday and continued until the incident where he slammed her into the wall. When questioned on that subject on redirect examination, the following exchange occurred: "Q. Did he ever put his mouth on your private? A. Yes. Q. After your 14th birthday? A.

On the Saturday after the Laundromat incident, L.M. told her mother that everything was getting worse, without specifying the details. On July 11 or 12, 2009, L.M. went to stay with Araceli. Two days later, L.M. told her cousin that her stepfather had been raping her since she was little. Her cousin told Araceli, who then spoke with L.M. On July 15, 2009, L.M. went to the police and reported the sexual abuse.

Crimes against A.M. (counts 2 & 3)

Appellant began molesting A.M. when she was 11 years old in sixth grade. He molested her more than 10 times when she was in sixth grade, more than 10 times the summer after sixth grade and more than 10 times in seventh grade. Appellant would insert his finger in her vagina, touch her breasts and thighs, use his penis to touch her and insert it into her vagina, and place his mouth on her lips and breasts. When appellant would call her into his bedroom, A.M. went out of fear, because appellant hit her with his belt when she disobeyed. He would tell her to remove her clothes and if she did not, he would do so. A.M. did not try to stop appellant because that would only "make things worse." Appellant would then take off his shorts, tell her to lie down on the bed, lie on top of her and use his body to prevent her from moving. He then moved his penis back and forth, getting up and leaving when he was done. A.M. went to the bathroom and wiped herself, removing "liquid" from her vagina. Appellant also would touch A.M.'s body and put his mouth on her vagina before he inserted his penis. The assaults ended in December 2008.

A.M. never told anyone, except her sisters, fearing appellant would find out and she would get into trouble. She did not tell her mother, believing her mother would not leave appellant because she had children with him.

Crimes against E.I. (counts 9 & 10)

Appellant began molesting E.I. when she was 11 or 12 years old in sixth grade. He would touch her breasts and thighs both under and over her clothing. He put his mouth on her breasts. When he tried to kiss her, she would move away to avoid him.

Yes. Q. And was that—Did that continue to occur up to the time when he slammed you against the wall? A. Yes."

These molestations occurred more than three times when E.I. was in each of the sixth, seventh and eighth grades. When E.I. tried to avoid appellant touching her, he would hit her with a belt. Appellant stopped sexually abusing her when she was 15 years old.

E.I. was scared to tell anyone because it would be embarrassing, and he might hit her. When L.M. told her that appellant had also molested her, E.I. did not believe her. But at some point, however, E.I. saw appellant on top of L.M. in bed.

E.I. corroborated the June 2009 family trip with appellant to the Laundromat. When she returned home, L.M. was upset and told E.I. that appellant had "fucked her" and cried.

On a later date, the police came to the home. E.I. did not answer the door. When appellant phoned her, she told him the police had been there. Appellant told her to pack some of his clothes and meet him at a nearby school. She did so with A.M. and dropped appellant off in a Griffith Park parking lot. Appellant wanted her to update him on what was going on by leaving notes under a rock.

The investigation

On July 15, 2009, Los Angeles Police Detective Kevin Stogsdill met with L.M., E.I. and A.M. They told him of the sexual abuses they had suffered consistent with their trial testimony.

On July 23, 2009, Julie Lister, a nurse practitioner and forensic nurse examiner, interviewed the three victims and conducted medical examinations on all of them except E.I., who refused. Each told her of the sexual abuse, consistent with their trial testimony. They said their last contact with appellant was before December 2008. The physical exams were "normal."

Appellant's defense

Appellant testified, denying ever touching his stepdaughters, ever hitting them with a belt, and ever talking to Maria about it. He claimed he was never home with his stepdaughters alone.

DISCUSSION

I. Propriety of CALCRIM Nos. 1190 and 301 instructions

A. Background

The trial court instructed the jury on witness credibility with the standard CALCRIM instructions, including CALCRIM No. 226, which sets forth the factors that may be considered in assessing credibility. The jury was also instructed on the one-witness rule in CALCRIM No. 301, which stated: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." Immediately after giving CALCRIM No. 301, the trial court instructed on the noncorroboration rule for sexual assault witnesses in CALCRIM No. 1190, which stated: "Conviction of a sexual assault crime may be based on the testimony of a complaining witness alone."

B. Contention

Appellant contends that the "non-corroboration rule for sexual assault" victims in CALCRIM No. 1190, was likely misinterpreted by the jury because of its placement, out of order, near the credibility instructions. He argues that CALCRIM No. 1190 is not a credibility instruction but that its placement next to the credibility instructions was likely to be interpreted as creating a special deference to the credibility of the complaining witness in a sexual assault case, resulting in a violation of due process in cases turning heavily on the credibility of the complaining witnesses.

The People contend that this issue is not properly raised on appeal because appellant failed to object to the sequence of the instructions in the trial court.

C. Forfeiture

A prerequisite to raising an issue for appellate review is an objection in the trial court preserving the issue for appeal. (*People v. Derello* (1989) 211 Cal.App.3d 414, 428.) The objection must be made on the same ground urged on appeal. (*Ibid*.) A party forfeits any challenge to a jury instruction that was correct in law and responsive to the evidence if the party fails to object in the trial court. (*People v. Virgil* (2011) 51 Cal.4th

1210, 1260.) This rule is applicable to the placement of correct instructions supported by the evidence.

Here, the substantively similar predecessor CALJIC instructions to CALCRIM Nos. 301 and 1190 have been found to be correct in law. As stated in *People v. Gammage* (1992) 2 Cal.4th 693, 700 (*Gammage*): "It is not disputed that both CALJIC No. 2.27 [the predecessor of CALCRIM No. 301] and No. 10.60 [the predecessor of CALCRIM No. 1190], considered separately, correctly state the law. 'In California conviction of a sex crime may be sustained upon the uncorroborated testimony of the prosecutrix.' [Citation.] We specifically upheld an instruction equivalent to CALJIC No. 10.60 as long ago as 1912. [Citation.]"[5]

The purpose of the forfeiture doctrine "'is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had. . . .'" (*People v. Walker* (1991) 54 Cal.3d 1013, 1023, overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 183.) This purpose could have been easily satisfied in this case, had appellant simply requested that the instructions be given in a different order or additional language provided to eliminate the alleged misconstruction to which appellant claims the two instructions were susceptible when they were given one right after the other.

Here, appellant made no objection to either CALCRIM Nos. 301 or 1190 or to the sequence in which those instructions were given. We therefore conclude that appellant has forfeited this claim.

D. Propriety of instructions

Even if we were to conclude that appellant did not forfeit this claim, we would nonetheless reject it on the merits. Appellant acknowledges, as he must, that our Supreme Court has found that the substance of CALCRIM Nos. 301 and 1190 are correct statements of law. (*Gammage*, *supra*, 2 Cal.4th at p. 700.) *Gammage* went further. It

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5 Because of their substantive similarity, we refer to the CALCRIM versions of these instructions henceforth in this opinion.

rejected the defendant's claim that CALCRIM No. 1190, in combination with CALCRIM No. 301, unconstitutionally "'creates a preferential credibility standard for the complaining witness.'" (*Gammage, supra*, at p. 700.)

Gammage reasoned that "each [of the instructions] has a different focus. [CALCRIM No. 301] focuses on how the jury should evaluate a fact (. . . required to be established by the prosecution) proved solely by the testimony of a single witness. [CALCRIM No. 1190], on the other hand, declares a substantive rule of law, that the testimony of the complaining witness need not be corroborated. It is given with other instructions on the legal elements of the charged crimes." (*Gammage*, *supra*, 2 Cal.4th at pp. 700–701.) *Gammage* held that "it is proper for the trial court to give [CALCRIM No. 1190] in addition to [CALCRIM No. 301] in cases involving sex offenses." (*Id*. at p. 702.)

Appellant argues that while CALCRIM Nos. 301 and 1190 are correct statements of law, placing CALCRIM No. 1190 next to CALCRIM No. 301 and the other credibility instructions creates the impression that CALCRIM No. 1190 is also a credibility instruction giving a preferential credibility standard to a complaining witness in a sex assault case. We disagree.

In reviewing purportedly erroneous instructions, "we inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72; *People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In conducting this inquiry, we are mindful that """a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge."""" (*People v. Frye, supra,* at p. 957 [under California law, correctness of jury instructions determined from entire charge of the court], disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Though *Gammage* did observe that CALCRIM Nos. 301 and 1190 were separated by numerous other instructions (See *Gammage, supra,* 2 Cal.4th at p. 700), it did not suggest that that was a determining factor in its decision, or, that if that were not the case,

the instructions would likely be misconstrued. On reviewing the language of CALCRIM No. 1190, in the context of all of the instructions given, we do not agree with appellant that somehow giving it immediately after CALCRIM No. 301 transformed it into a special deference to a complaining witness in a sexual assault case.

The jury was instructed that it was to "[p]ay careful attention to all of these instructions and consider them together." Hence, wherever CALCRIM Nos. 301 and 1190 were placed, the jury was instructed to consider them together. Indeed, the general rule is that the order in which instructions are given is immaterial. (*People v. Visciotti* (1992) 2 Cal.4th 1, 61.)

We find nothing in the language of CALCRIM Nos. 1190 and 301, which, when considered together, morphs CALCRIM No. 1190 into a credibility instruction "demanding some level of deference to the testimony of the complaining witness in contrast to any other single witness . . . ." CALCRIM No. 301 is a cautionary instruction that provides that "[t]he testimony of only one witness" is necessary to "prove any fact," but that before the jury can find proof of a given fact based on a single witness, it "should carefully review all the evidence." Consistent with CALCRIM No. 301, CALCRIM No. 1190 also provides that the conviction of a sexual assault crime may be based on the testimony of a single witness, the complaining witness. It does not negate the admonition in CALCRIM No. 301 that the jury should consider all of the evidence before relying on that single witness. It provides that the complaining witness' testimony can be sufficient, not that such testimony is entitled to any special deference.

We therefore do not find it reasonably likely that the jury would misconstrue CALCRIM Nos. 301 and 1190 to create a preference for the credibility of the complaining witness in a sexual assault case simply because of their placement near each other. (*People v. Bacon* (2010) 50 Cal.4th 1082, 1110 [when reviewing a purportedly ambiguous jury instruction, the reviewing court ask whether the jury was reasonably likely to have construed the instruction in a manner that violated the defendant's rights].)

II. Sufficiency of evidence to support (count 7-forcible oral copulation)

A. Background

The information alleged in count 7 that appellant forcibly orally copulated L.M. between October 13, 2008, and June 30, 2009, the period after she had turned 14 years old. At the conclusion of the People's case, defense counsel made a section 1118.1 motion to dismiss count 7, among others, on the ground that there was insufficient evidence that appellant forcibly orally copulated L.M. The People responded that, "Forcible sexual assaults encompass the commission of such sexual acts through fear imposed on the victim." L.M. lived under circumstances of enforced fear of physical harm and testified that she was fearful of appellant's violence. The trial court denied the motion.

B. Contention

Appellant contends that there is insufficient evidence to support his conviction of forcible oral copulation of L.M. He argues that evidence is lacking in two respects: First, he argues that there is insufficient evidence that he orally copulated her in the alleged time period; second, there is no evidence that he used force to do so. This contention borders on the frivolous.

C. Standard of review

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) An appellate court deciding whether sufficient evidence supports a verdict must determine whether the record contains substantial evidence—which has been repeatedly described as evidence that is reasonable, credible, and of solid value—from which a reasonable jury could find the accused guilty beyond a reasonable doubt. (*People v. Hovarter* (2008) 44 Cal.4th

983, 996–997.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

D. Elements of forcible oral copulation

Section 288a, provides in part: "(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person. . . . [¶] . . . [¶] [c] . . . (2)(A) Any person who commits an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years." The gravamen of forcible oral copulation is a sexual act accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury, and it is only when one participant in the act uses force to commit the act against the other person will an otherwise lawful act becomes unlawful. (See *People v. Guido* (2005) 125 Cal.App.4th 566, 576.) All that is required to commit the crime is contact with the mouth of one person with the genital organ of the other; proof of copulation is unnecessary. (See *People v. Hunter* (1958) 158 Cal.App.2d 500, 505.)

E. Oral copulation after age 14

Pointing to one isolated portion of L.M.'s testimony, appellant argues that there is insufficient evidence that she was the victim of oral copulation during the period of October 13, 2008, through June 30, 2009, as alleged in the information. L.M. turned 14 years old in October 2008. Appellant left the family residence for a week in December 2008, and in January or February 2009 grabbed L.M. and pushed her against the wall when she refused his advances. There was no sexual contact during that incident. Regarding the Laundromat incident that occurred in June 2009, L.M. testified: "Q. Before he [pressed his penis against her vagina] did [appellant] have his mouth down there before? A. I don't recall that time. Q. Had he done anything to you at all after your 14th birthday where he had his mouth on your privates?" L.M. responded, "Um, I think." Appellant claims that this testimony is speculative as to whether L.M. was orally copulated after she turned 14 years old.

But under the applicable standard above described, we do not focus on the evidence favoring appellant, but instead consider the record in the light most favorable to the judgment. (*People v. Bolin, supra,* 18 Cal.4th at p. 331.) That analysis convinces us that there is substantial evidence that appellant orally copulated L.M. during the alleged time period. L.M. also testified that even after the summer of 2008, appellant continued inserting his penis in her vagina and putting his mouth on her vagina after she turned 14. Reinforcing her response to whether he did so during the Laundromat incident where she said, "Um, I think," she testified that on that occasion he did the same things "as usual" and had earlier testified that oral copulation before inserting his penis was usual. She had testified that appellant put his mouth on her vagina before *each time* that he inserted his penis in her vagina. This evidence considered not piecemeal, but in its entirety, was sufficient for the jury to conclude that appellant orally copulated L.M. after she was 14 years old.

F. Duress in the oral copulation

Appellant argues that there is no evidence that the oral copulation after her 14th birthday was accomplished by the use of force. He ignores, however, that the offense can also be committed not only by the use of force, but also by duress, menace, or fear of immediate and unlawful bodily injury. "Duress" within the meaning of the statute is a direct or implied threat of force, violence, danger, hardship or retribution sufficient to coerce reasonable person of ordinary susceptibilities to perform acts which otherwise would not have been performed or acquiesce in acts to which one otherwise would not have submitted. (*People v. Senior* (1992) 3 Cal.App.4th 765, 775.) "Duress" can also involve psychological coercion and can arise from various circumstances, including the relationship between defendant and victim and their relative ages and sizes. (*Ibid.*; *People v. Superior Court (Kneip)* (1990) 219 Cal.App.3d 235, 239.) "Where the defendant is a family member and the victim is young, . . . the position of dominance and authority of the defendant and his continuous exploitation of the victim" is relevant to the existence of duress. (*People v. Superior Court (Kneip), supra,* at p. 239.) Threatening to hit a reluctantly participating 14-year-old child if she resists and threatening to hurt her

and break up family unit if she tells are sufficient to establish that later molestations are accomplished by duress. (See *People v. Senior, supra,* at p. 775.)

Here, there was overwhelming evidence that L.M. submitted to appellant's sexual assaults out of duress, as well as fear of bodily injury. First, as stated above, appellant was L.M.'s stepfather and an authority figure to her. Their age disparity and disparity in family position was itself coercive. (*People v. Senior*, *supra*, 3 Cal.App.4th at p. 775; *People v. Superior Court (Kneip)*, *supra*, 219 Cal.App.3d at p. 239.) Second, when L.M. complained during the sexual attacks by appellant that the insertion of his penis in her vagina hurt, he nonetheless continued his assault. If she tried to move away, he told he "no," that it was "okay." After the sexual encounter he would instruct her to go and clean herself. Third, L.M. recounted that appellant became angry when she did not follow his directions to come into his bedroom to submit to his sexual advances. When she resisted, he would hit her with a belt and make her clean the house. L.M. knew that appellant also hit her siblings in the past, having spoken to the social worker regarding the bruise to M.P.'s arm inflicted when M.P. was hit by appellant with a sandal or a belt. Fourth, even when appellant left the family home for a week in December 2008, he threatened L.M. that she was "not going to get rid of [him]." When he returned, he ominously and inexplicably told L.M. that she had one month. When he again sought to molest L.M. and she refused, he threw her against a wall. Finally, L.M. testified that she did not report appellant's assaults to relatives because she feared he "would [do] something to [them]" if she did. He had warned her not to say anything about what he did.

This history amply demonstrates sufficient evidence that appellant orally copulated L.M. by use of duress and threats of psychological and physical harm.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ